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Summary record of the 29th meeting
Held at Headquarters, New York, on Thursday, 11 November 1999, at 10 a.m.

Chairman Mr. Mochochoko ..... (Lesotho)

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00-24347 (E)

The meeting was called to order at 10.25 a.m.

Agenda item 161: Review of the Statute of the United Nations Administrative Tribunal (*continued*) (A/C.6/54/L.13)

1. **Mr. Thierry** (President of the United Nations Administrative Tribunal) recalled that the Administrative Tribunal, which had been established in 1949, was supposed to settle disputes relating to the work and professional careers of staff of the United Nations and also of the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), which had accepted its jurisdiction.

2. The work of the Tribunal was indispensable, since it was inconceivable that a dispute arising from relations between United Nations staff members and the Organization could be submitted to a national court without compromising the independence of the international civil service; moreover, if staff members could not seek recourse from an authentic jurisdiction capable of safeguarding their rights, they would be deprived of guarantees that most legal systems conferred on national civil servants.

3. That principle had been acknowledged by the League of Nations, which had set up a Common Administrative Tribunal for the League and the International Labour Office (ILO). After the Second World War, the ILO Administrative Tribunal continued the work of the League of Nations Tribunal, and in 1946 the General Assembly called upon the Secretary-General to establish a committee to draft the statute of a United Nations administrative tribunal; the committee found its work hampered by some Member States who feared that an administrative tribunal would undermine the Secretary-General's authority and, most importantly, could not imagine how the General Assembly could be subject to the dictates of a subsidiary body it had itself created. The Tribunal Statute, adopted in 1949, struck a happy balance between the principle of the Tribunal's authority and a limited notion of its jurisdiction and powers. As early as 1950 the Tribunal's authority had been called into question owing to judgements which had awarded compensation to staff members who had been dismissed on political grounds. The General Assembly had then requested the International Court of Justice to issue an advisory opinion on the legal scope of the Tribunal's decisions; on 13 July 1954 the Court recognized that the Tribunal had full jurisdiction and that its judgements were binding, including on the General Assembly. Since then, there had been no questioning of the Tribunal's authority, and it should be noted that in the 50 years that had elapsed since 1949 every one of the Tribunal's judgements had been implemented without exception.

4. The work of the Tribunal was also difficult. The Tribunal applied its Statute and the Staff Regulations and Rules in the cases submitted to it as well as General Assembly resolutions and administrative instructions. However, those were not the only elements of law applicable to the international civil service in the United Nations. In certain circumstances, the Tribunal had had occasion to refer to the Charter itself, particularly Articles 100 and 101 thereof, which affirmed the independence of the international civil service, and it also applied its own case law, which was characterized by a set of concepts taken from a combination of European administrative law, especially French administrative law, and common law. The Tribunal's case law was also noteworthy from the standpoint of the place it gave to the general principles of law; mention should be made in that connection of the principle of equal treatment, which meant that staff in similar situations enjoyed the same rights, the principle of non-discrimination, which meant, *inter alia*, that women enjoyed the same rights as men in respect of promotion and must be protected from discriminatory practices in the performance of their functions, and the principle of good faith, which meant that staff must not be misled by the administration or denied access to documents that were of interest to them. Respect for due process was always a consideration in the Tribunal's decisions.

5. In fact, by applying general principles, the Tribunal sought, often successfully, to make administrative practice more ethical and, above all, to ensure that justice was done, bearing in mind all the particulars of each case. The Tribunal did not merely try to apply regulations automatically. Judges had to ensure that the law was applied, but they also had to take into account the way in which it was applied. The law operated through general norms, and justice worked on a case-by-case basis, depending on the particulars of each case. Of course it was helpful for judges to have a thorough understanding of the law, but their professional responsibility was made apparent by

their detailed study of the facts, and their talent was measured by the way in which they assessed those facts as they related to the applicable law.

6. Since its establishment 50 years earlier, the Tribunal had issued more than 900 judgements; however, what stood out in its history was that it had generally won the trust of all parties, the staff, the administration and even the States Members of the Organization. The staff's trust was evident in the ever-growing number of appeals lodged, even though the Tribunal had rejected many of them. From 1950 to 1959 the Tribunal had handed down 80 judgements; from 1960 to 1969 it had issued 54; from 1970 to 1979, 118; from 1980 to 1989, 218; and from 1990 to August 1999, 459. The administration, too, had placed its trust in the Tribunal. No judgements had gone unexecuted, and no matter how severe some judgements had been in respect of certain omissions or irregularities committed by the administration, the administration had never raised any objections with the Tribunal. In fact, in proposing a reform of the administration of justice within the Secretariat, criticisms had been directed at the phases of inquiry leading up to the Tribunal's decisions and not against the Tribunal itself.

7. It should also be noted that the Tribunal enjoyed the trust of the Member States, and the revocation of article 11 of the Tribunal's Statute was significant in that regard. After the International Court of Justice issued its opinion in 1954 stating that the General Assembly could not refuse to give effect to obligations arising from the Tribunal's judgements, a review procedure had been instituted which gave Member States the right to question the Tribunal's judgements. Under that procedure, parties and Member States alike could appeal to the Committee for Requests to Review Judgements of the Administrative Tribunal, composed of Member States, which could request an advisory opinion from the International Court of Justice as to the validity of the Tribunal's judgements. That procedure had been applied only three times, in the Fasla (1973), Mortished (1982) and Yakimetz (1987) cases, and in all of them the Court had upheld the Tribunal's judgements, which showed that the review procedure was of little value. Article 11 of the Statute, which referred to that procedure, had been deleted by General Assembly resolution 50/54 of 29 January 1996, with the result that the Tribunal's judgements were now truly final and without appeal. That testified to the trust of Member States, who rejected the right to investigate the Tribunal's judgements by means of a review procedure. Moreover, the aforementioned resolution had been adopted by consensus, which showed that some Member States had moved away from their earlier suspicion. Another sign of confidence in the Tribunal was the fact that the International Court of Justice had recently decided that the Administrative Tribunal would have competence to hear appeals from members of its own secretariat.

8. For half a century the Tribunal had served a purpose and rendered justice. Without disrupting the smooth operation of the administration, it had settled numerous disputes which, while perhaps less pressing than the major problems of the world, were of great importance to the parties concerned, since they affected their situation, the professional careers and, in some cases, their honour.

9. Any institution could be improved, and it was particularly fortunate that the Sixth Committee was to take a decision on certain aspects of the Tribunal's Statute. Some of the proposed reforms could help to improve the functioning of the Tribunal on the basis of experience and enjoyed the support of the Tribunal's members. Such was the case with the proposal to renew the term of office of members with a view to ensuring greater stability in the composition of the Tribunal and allowing it to draw amply on the experience gained by its members in the first years of their terms. Likewise, changing the title of certain posts would be in keeping with the Tribunal's jurisdictional function. Lastly, the procedure whereby the Tribunal could issue a joint statement in the event of disagreement among the members of a panel would prevent judgements from being issued by too small a group of judges. Thanks to those reforms the Tribunal would continue to discharge honourably the mandate it had been given in 1949 for years to come.

10. **Ms. Dickson** (United Kingdom) said that her country attached great importance to the work of the Administrative Tribunal because it was a necessary and valuable part of the United Nations system and because its judgements could have enormous consequences for the system.

11. Given that its Statute should be improved to enable the Tribunal to deal with its ever-heavy workload more effectively, the delegations of France and the United Kingdom, joined now by Ireland, had prepared a draft resolution (A/C.6/54/L.13) which

contained proposals designed to raise the Tribunal's standing and assist its members in their work; none of them radically altered the Tribunal's structure or had any financial implications.

12. The first amendment (para. 1 (a)) corresponded to article 3, paragraph 1, of the Statute and reflected the sponsors' view that the judicial character of the Tribunal would be more evident if the members were titled "judges". In addition, the Statute did not specify qualifications the members should have, but in view of the legal nature and increasing complexity of the issues with which the Tribunal dealt and the importance of its decisions, the wording of the Statute should be brought into line with the statutes of other, similar bodies and stipulate that only persons of high moral character who were qualified for high judicial office in their own countries or who were jurisconsults of recognized competence were eligible for appointment to the Tribunal.

13. Currently, members of the Tribunal were appointed for a three-year period. Paragraph 1 (b) of the draft resolution contained a proposal to increase the term of office to a four-year term that could be renewed once. That would allow members to become fully familiar with the functioning of the Tribunal and would provide for more continuity. Paragraph 2 of the draft addressed the case of existing members of the Tribunal who might be disadvantaged by the new provision and provided that they would be eligible for re-election if they had served not more than six years on the Tribunal and had the relevant legal qualifications.

14. The Statute as currently drafted was silent on the question of the members' independence, their impartiality and their disqualification and recusal from a particular case; the sponsors believed it was appropriate to include such provisions because they conferred on the Tribunal a more judicial and authoritative character.

15. In paragraph 1 (d) of the draft resolution it was proposed that the title of the post of Executive Secretary of the Tribunal should be renamed "Registrar", while in paragraph 1 (e), which partially reflected the existing text, it was proposed that in the exercise of duties under the Statute, the Registrar should act impartially and be responsible to the Tribunal. Those provisions in no way altered the functions or the status of the Executive Secretary.

16. The final amendment proposed to the Statute was contained in paragraph 1 (f) and related to the number of members hearing a case. Currently the Tribunal was required to sit as a panel of three members in each case, pursuant to article 3, paragraph 1, of the Statute. Although that provision was designed to expedite the work of the Tribunal, the sponsors believed that there might be occasions when it would be appropriate for all the members to hear a case, such as when the panel of three judges was of the view that the case raised a significant question of law or when it could not reach a decision by unanimity.

17. **Mr. Alabrune** (France) said that the United Nations Administrative Tribunal, in addition to discharging its duties fully, had won the confidence of Member States, the Secretariat and the staff, and had become a consummate jurisdiction which reflected the contributions of different legal systems. Given that the Tribunal's Statute did not fully correspond to a real jurisdiction, the sponsors of draft resolution A/C.6/54/L.13 were proposing various amendments to that instrument which sought to affirm that jurisdiction.

18. First, to enhance the Tribunal's authority, the draft proposed spelling out in the Statute that Tribunal members would have the title of judge and that the Executive Secretary would be called the Registrar. Second, candidates for judgeships should be persons of high moral character and possess the qualifications required in their respective countries for appointment to high judicial office or be jurisconsults of recognized competence. Third, in order to give the judges time to familiarize themselves with their functions, the sponsors of the draft resolution thought it would be useful for the term of office to be four years, renewable once. Lastly, given that the Tribunal's jurisprudence showed that difficult questions of law or difficulties in reaching a unanimous decision arose frequently, the sponsors believed it would be useful to provide for the possibility of a case being heard by the plenary Tribunal.

19. He hoped that the General Assembly would adopt the amendments during the coming year, which marked the fiftieth anniversary of the Tribunal.

20. **Mr. Kingston** (Ireland) said that he was a firm proponent of increasing the independence and standing of the Administrative Tribunal and, in particular, deleting article 11 of its Statute. Accordingly, he welcomed the draft resolution submitted by France and

the United Kingdom (A/C.6/54/L.13) to that end. In particular, he supported the amendments concerning the qualifications required of judges serving on the Tribunal, the term of office of judges and the possibility of allowing some cases to be heard by the whole Tribunal. Lastly, he requested that both the text of the draft resolution under consideration and the Tribunal Statute itself should use gender-inclusive or gender-neutral language.

21. **Mr. de Saram** (Sri Lanka) said that his delegation was generally supportive of the proposed amendments contained in draft resolution A/C.6/54/L.13 because it believed that the Administrative Tribunal was really an internal court of the United Nations which was necessary because of the immunity from the jurisdiction of national courts enjoyed by the United Nations. That was why the Tribunal had to be vested with the necessary status and safeguards to ensure its impartiality and independence.

22. However, he had reservations concerning the new wording proposed for article 8 of the Statute, since it seemed to imply that it was necessary or useful for Tribunal decisions to be unanimous when, as the case law of other courts showed, divergent opinions were always very valuable. The new article 8 should perhaps be redrafted to address that problem.

23. **Mr. Lavalle-Valdés** (Guatemala) said that in general he supported draft resolution A/C.6/54/L.13, but he wished to make three observations: first, with regard to the proposed wording of article 3, paragraph 3, of the Statute, which prohibited members of the Tribunal from engaging in other activities, the rules of the Tribunal would have to be amended to that end, and that could create practical problems, given that the judges received no remuneration of any kind and so usually had to engage in other activities. With regard to the new paragraph 4, it must be made clear that the right of recusal extended to all parties in a case; lastly, the Tribunal's rules would have to be changed so that the parties to a case could learn which judges were going to hear it sufficiently in advance to be able to exercise their right of recusal with full knowledge of the case.

24. **Mr. Tanzi** (Italy) welcomed the proposed amendments and agreed that the jurisdictional nature of the Administrative Tribunal should be strengthened.

25. **Mr. Tankoano** (Niger) endorsed the remarks made by the representative of Sri Lanka regarding the new text for article 8 of the Statute.

26. **Ms. Telalian** (Greece) said that the proposals by France, Ireland and the United Kingdom were very positive and would help to enhance the functioning of the Administrative Tribunal, the status of its members and the quality of its judgements.

Agenda item 156: Report of the United Nations Commission on International Trade Law on the work of its thirty-second session (*continued*) (A/C.6/54/L.4)

27. **Mr. Marchik** (Austria), introducing the draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-second session" (A/C.6/54/L.4), announced that Armenia, Bolivia, Egypt, Indonesia, Peru, Thailand, Ukraine and Venezuela had joined in sponsoring the draft resolution. The text of the draft was essentially the same as that of the previous year. A new third preambular paragraph had been added in order to take into account the trend towards internationalization in trade relations. Paragraph 7 (a) had been modified to specify the countries in which seminars had been organized and briefing missions held and, in response to the wishes expressed by certain States, the phrase "and enhance" had been added in paragraph 11. His delegation hoped that, as in the past, the draft resolution would be adopted by consensus.

28. **Mr. Al-Baharna** (Bahrain) said that he would have preferred to have paragraph 12 list the conventions emanating from the work of the United Nations Commission on International Trade Law.

29. *Draft resolution A/C.6/54/L.4 was adopted.*

Agenda item 159: Report of the Special Committee on the Charter of the United Nations and on the strengthening of the role of the Organization (*continued*) (A/C.6/54/L.5)

30. **Ms. Flores** (Mexico), introducing the draft resolution entitled "Strengthening of the International Court of Justice" (A/C.6/54/L.5), recalled that the item had been considered by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, which had sought comments from States and from the Court with regard

to the increase in the volume of the Court's work. The draft resolution had been adopted by consensus by the Special Committee, and she hoped that it would be adopted in the same manner by the Sixth Committee.

31. *Draft resolution A/C.6/54/L.5 was adopted.*

The meeting rose at 11.30 a.m.

United Nations A/C.6/54/SR.30

General Assembly

Fifty-fourth session

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Sixth Committee

Summary record of the 30th meeting

Held at Headquarters, New York, on Friday, 12 November 1999, at 10 a.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

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00-26822 (E)

The meeting was called to order at 10.25 a.m.

Agenda item 153: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (A/54/515)

1. **Mr. Hanson-Hall** (Ghana) said that, while the number of participants at the Geneva International Law Seminar and the lectures given at the Hague Academy of International Law and recipients of the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea was impressive, many candidates had been turned away for lack of funds. In addition to expressing the appreciation of the Advisory Committee on the Programme to the Member States, organizations, universities, foundations and other institutions that had contributed in many ways to the success of the Programme of Assistance, he would therefore take the opportunity to appeal once again for voluntary contributions to promote its noble ideals.

2. On behalf of the Advisory Committee, he wished to commend the Office of Legal Affairs for bringing the United Nations *Treaty Series* and the *United Nations Juridical Yearbook* up to date and for making them available, along with other legal information, on the Internet. He hoped that the United Nations Institute for Training and Research (UNITAR) would continue to participate actively in the fellowship programme.

3. **Mr. Hakapää** (Finland), speaking on behalf of the European Union, noted that the Union had contributed actively to the Geneva International Law Seminar, which had been financially supported by Austria, Denmark, Finland and Germany, and to the annual lectures in private and public international law given at the Hague Academy of International Law, which had received voluntary contributions from Germany, Ireland and the United Kingdom. Germany and the United Kingdom had also made major contributions to the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea and to other special fellowships on the national level. Among the European institutions which had participated in such programmes were the Rhodes Academy of Oceans Law and Policy of Greece; the Max Planck Institute for Foreign Public Law and International Law of Heidelberg, Germany; the Netherlands Institute for the Law of the Sea of the University of Utrecht, Netherlands; and the Faculty of Law of the University of Oxford, the Institute of Maritime Law of the University of Southampton and the Research Centre for International Law of the University of Cambridge, United Kingdom. In addition, Austria had contributed resources to the International Development Law Institute to finance, in particular, scholarships for students from Eastern Europe to study in the fields of the rule of law and international trade and commercial law. The Ministry of Foreign Affairs of Finland, in addition to organizing and funding seminars and symposia on international law, had supported the publication of the *Finnish Yearbook of International Law* and the *Nordic Journal of International Law*. In early 1999, the Ministry of Foreign Affairs of Portugal had organized a conference on international law in which universities and members of international courts had participated.

4. Student and teacher exchange also promoted an understanding of international law. Under the Socrates programme and, in particular, the Erasmus programme for higher education, the European Union had created a network of university cooperation throughout Europe, providing financial support to universities and teachers and above all to students, to enable them to study abroad.

5. In addition, the States parties to the Hague Conventions of 1899 and 1907, through their assessed contributions, supported the functioning of the Permanent Court of Arbitration. The seminar recently organized by the Government of France on access of victims to the future International Criminal Court had served to promote and disseminate not only the Rome Statute but also a new legal concept, the role of victims in criminal proceedings. In May 1999, the Ministry of Foreign Affairs of Italy had co-sponsored an international conference at the University of Trento on the Rome Statute.

6. The United Nations *Treaty Series*, the *United Nations Juridical Yearbook*, the *Yearbook of the International Law Commission* and other documents, together with the United Nations web site on the Internet, all constituted important contributions to international law.

7. **Mr. Kim Doo-young** (Republic of Korea) said that international law was an indispensable tool for the promotion of international peace and security, but its importance was not fully recognized, even in academic circles. The United Nations Programme of Assistance was a catalyst for enhancing general awareness of the

link between international law and harmonious international relations.

8. Recent achievements in the application of the Programme of Assistance had been substantial, with the creation of the United Nations Audiovisual Library in International Law, the awarding of a number of new international law fellowships and greater participation by developing countries in regional and international conferences on international law. There was nonetheless a need to expand participation in the Programme of Assistance to a wider spectrum of the international community, especially developing countries, perhaps through the use of information technology.

9. The Republic of Korea fully supported the principles and rules of international law and continued to allocate substantial resources to its promotion. Approximately 80 universities in the country were currently offering undergraduate and postgraduate courses in a wide variety of topics in the field. Four major academic societies also promoted international law. The Korean Association of International Law, the most active of the societies and the one with the largest membership, had organized nine seminars on international law over the previous two years. It also published twice yearly the *Korean Journal of International Law*.

10. As a further example of the promotion of international law by the Government of the Republic of Korea, the Humanitarian Law Institute, the legal arm of the Republic of Korea National Red Cross, regularly gave lectures on international humanitarian law to members of the Red Cross and since 1973 had been organizing conferences on international humanitarian law in cooperation with academic institutions; the conference in 1999 would concern the four Geneva Conventions of 1949 and the two additional protocols of 1977.

11. **Mr. Kamal** (Malaysia), speaking on behalf of the Association of South-East Asian Nations (ASEAN), urged the States that had made voluntary contributions to the Programme of Assistance to increase their contributions in order to enable the growing number of applicants to participate, especially those from developing countries. In view of the problems that had arisen regarding the organization of some of the fellowship programmes, if a selected candidate could not use the fellowship, urgent arrangements should be made to choose a replacement.

12. ASEAN thanked the Government of the Islamic Republic of Iran for its offer to host a refresher course in international law and contribute to financing thereof, and the other Governments which were to collaborate in the effort.

13. In view of the ever increasing number of candidates applying for the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea, the endowment should be increased, so that more than one fellowship could be awarded each year.

14. Lastly, ASEAN urged the United Nations to promote the use of the Internet as a means of transmitting information and documents on international law more widely, especially to developing countries.

15. **Ms. Long** (Singapore) said that her delegation aligned itself with the statement made by the representative of Malaysia on behalf of ASEAN. Singapore had participated in the thirty-fifth session of the Geneva International Law Seminar, which enabled young people in the legal field, particularly those from developing countries and from countries not members of the International Law Commission, to learn about the Commission's work. It had also participated in the UNITAR Fellowship Programme in International Affairs Management, which provided junior and mid-level diplomats the opportunity to learn about international political relations, intergovernmental institutions, international law and other aspects of multilateral diplomacy.

16. Being very much dependent on trade, Singapore had participated actively in the work of the United Nations Commission on International Trade Law (UNCITRAL). The seminars and symposia organized in conjunction with the Programme of Assistance were vital in enabling developing countries to learn about the work of UNCITRAL and to adopt and implement its texts.

17. On the regional level, the ASEAN countries were mindful that they must adapt their legal structures to keep pace with global trends. In November, Singapore had hosted a meeting of ASEAN ministers of justice, at which it had been decided that each country should create an authority to encourage data exchange, should establish networks linking legal officers and law

graduates of ASEAN member countries through seminars and exchange visits, and should publish a guide to the governmental and legal structures of member countries, to be distributed to government officials and made available to the public, especially lawyers.

18. **Mr. Tankoano** (Niger) said that, under the United Nations Programme of Assistance, many beneficiaries from developing countries had received fellowships or assistance enabling them to participate in international seminars and conferences at which important international conventions and treaties had been adopted.

19. In recent years, the Niger had taken various steps to contribute to implementation of the Programme of Assistance. In 1997, fundamental concepts of international law, such as human rights, the rights of the child and humanitarian law, had become part of the official curriculum of civic education.

20. Financial constraints prevented the Niger, like many other developing countries, from disseminating instruction in international law as widely as it would wish at the primary school level and on a national scale. For purposes of primary education, it would be helpful if the United Nations were to publish some small basic texts. For purposes of dissemination on a national scale, a United Nations fund might be established to finance the publication of basic texts in international law.

21. Lastly, the Niger would like the Secretary-General to update the collection of journals in the Secretariat's law library, which was essential for the work of legal advisers at the permanent missions.

22. **Mr. Droushiotis** (Cyprus) said that his delegation aligned itself with the statement made by the representative of Finland on behalf of the European Union, particularly with regard to the importance of the United Nations Programme of Assistance; since its creation the Programme had rendered valuable assistance to countries in all regions of the world and had demonstrated great vitality.

23. Since the United Nations Decade of International Law was drawing to a close, the Programme of Assistance would be left to carry on the work of promoting international law and fulfilling the purposes set forth in General Assembly resolution 2099 (XX) on its own. His delegation therefore supported the recommendations of the Secretary-General with regard to the execution of the Programme of Assistance in the biennium 2000-2001 (A/54/515). In view of the need to strengthen and expand the Programme, his delegation urged States to make voluntary financial contributions to the Programme; Cyprus, too, within its means would make annual contributions to the various components of the Programme. International law was particularly important to small vulnerable States, which often found it their only recourse for resolving their problems.

24. **Mr. Fruchtbaum** (Solomon Islands) said that the report of the Secretary-General (A/54/515) clearly showed that, with a very limited budget, a significant amount had been and continued to be accomplished through fellowship programmes and teaching support.

25. However, his delegation had the same criticism to make of the Programme of Assistance as it had made of the United Nations Decade of International Law. The activities of the Programme and of the Decade had been directed chiefly at legal scholars rather than children, adults not attending university and journalists. Although the report noted that significant work was being done via the Internet, those efforts were not designed to reach the people who had very little understanding of the importance and basic elements of international law. The Niger was to be commended for its efforts to disseminate the concepts of international law through primary education and civic studies; that was the way international law should be disseminated. During the United Nations Decade of International Law, a splendid opportunity had been lost to bring a knowledge of international law to non-specialists. It was to be hoped that with appropriate financing the Programme of Assistance could place more emphasis on true dissemination and appreciation of international law.

Agenda item 152: Convention on jurisdictional immunities of States and their property (*continued*) (A/54/10 and A/54/266; A/C.6/54/L.12)

26. **Mr. Hafner** (Austria), Chairman of the Working Group charged with considering outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property, reported that the Working Group had met on 8 and 9 November 1999 and had had before it the draft articles submitted by the International Law Commission to the General Assembly in 1991, the comments submitted by Governments since 1991 (A/47/326 and Add.1-5,

A/48/313, A/48/464, A/52/294, A/53/274 and Add.1 and A/54/266; A/C.6/48/3), document A/C.6/49/L.2 containing the conclusions of the Chairman of the informal consultations held in 1994 in the Sixth Committee, chapter VII of the report of the International Law Commission (A/54/10) and the report of its Working Group on Jurisdictional Immunities of States and Their Property annexed thereto.

27. The discussions of the Working Group had revolved around four points, namely, the possible form of the outcome of the work on the topic; the five outstanding substantive issues identified in the report of the Working Group of the International Law Commission; the appendix to the report of the Commission's Working Group concerning the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms; and the future course of action to be taken with regard to the topic.

28. With regard to the possible form of the outcome of the work on the topic, a number of delegations had been of the opinion that it should take the form of a convention, which would make it possible to limit the proliferation of different national laws on the topic and would introduce the necessary elements of uniformity, legal certainty, consistency and clarity. Other delegations had felt that, although a convention would be the ideal goal, it would be more realistic to aim towards a model law, given the divergent views of States and the controversial nature of some of the issues still to be resolved. A model law could serve as a compromise between those who sought a convention and those who did not think that there was a need for regulation in that area. Moreover, a model law would offer the advantage of being a flexible instrument that could provide guidance to national legislatures and judicial organs and might facilitate the resolution of the issues still pending. The view had also been expressed that a model law should not necessarily be perceived as a secondary means of codification, as it could serve as a reflection of customary law on the matter. Some delegations had been willing to accept a model law only as an interim measure until a convention could be adopted. Others had opposed a model law because they had felt that it did not carry sufficient legal weight; its legal nature was uncertain and it might give rise to inconsistencies in its application by States. The question had been raised as to how long it would take to transform the draft articles prepared by the Commission into a model law and whether that task should be performed by the Commission itself or by the Working Group of the Sixth Committee.

29. The first of the five outstanding issues concerned the concept of a State for purposes of immunity. General support had been expressed for the suggestion of the International Law Commission to merge subparagraphs (b) (ii) and (b) (iii) in paragraph 1 of draft article 2, dealing with constituent units of a federal State and political subdivisions of the State and to replace the words "sovereign authority" by "governmental authority". It had been suggested that the text of the new subparagraph (b) (ii) should read "political subdivisions of the State, including, in particular, constituent units of a federal State". It had also been suggested that the adjective "federal" in the expression "constituent units of a federal State" should be eliminated in order not to exclude entities such as confederation and unions. It had also been proposed that the word "entitled" should be replaced by the word "authorized" or "empowered" in subparagraph (ii) and new subparagraph (iii) (former iv) in order to better indicate that, originally, only the State and its property enjoyed immunity. With regard to the bracketed phrase "provided that it was established that such entities were acting in that capacity" (A/54/10, annex, para. 27), some delegations had been in favour of deleting it, as it might unduly authorize foreign courts to pass judgement on aspects of the public law of other States. It had also been said that the phrase would be better placed in the commentary. Other delegations had been in favour of retaining the phrase as a condition for immunity. Some had felt that the phrase should be included in a new subparagraph (iii) (former iv) relating to "agencies or instrumentalities of the State". However, it had been noted that the verb tense used in the phrase might lead to confusion as to its interpretation and that the wordings of subparagraphs (ii) and (iii) should be consistent.

30. With regard to the second outstanding issue, criteria for determining the commercial character of a contract or a transaction, some delegations had supported the suggestion that paragraph 2 of draft article 2 should be deleted, following the example set by the national laws of many countries on jurisdictional immunities which did not lay down any criteria for distinguishing between commercial and non-commercial transactions, leaving it to the courts to decide. Several delegations that would, in principle, be

in favour of "nature" as a sole criterion of distinction or of "nature" supplemented by the purpose test, had felt that the Commission's suggestion was a good way out of the difficulties posed by the issue, particularly since, in practice, the distinction between the nature and the purpose tests might be less significant than was at first thought.

31. Some other delegations had thought that to eliminate the criteria provided in paragraph 2 was to eliminate the very core of the draft articles. If the purpose of the transaction was not profit as such but only the advancement of the public interest, then the transaction was not commercial even if its nature might lend itself to another interpretation. To delete paragraph 2 did not solve the problem and only deferred the decision as to whether a specific transaction was commercial or not and consequently whether the State enjoyed or did not enjoy immunity.

32. Some delegations had been in favour of alternative (e) (paragraph 59 of the report of the Commission's Working Group), which laid primary emphasis on the nature test supplemented by the purpose test, with some restrictions on the extent of "purpose" or with some enumeration of "purpose". Other delegations had found alternative (g) in paragraph 59 more acceptable. Some delegations had supported the possible compromise suggested by the Chairman of the 1994 informal consultations, namely, to give States the option of indicating the importance assigned to the purpose criterion under their national law or practice by means of a general declaration or a specific notification to the other party in relation to a particular contract or transaction (A/C.6/49/L.2, para. 6).

33. With regard to the third outstanding issue, the concept of a State enterprise or other entity in relation to commercial transactions, some delegations had supported in principle the suggestion made by the Commission to add to current paragraph 3 of draft article 10 the clarification contained in paragraph 80 of the report of the Commission's Working Group. Some of those delegations, however, had thought that further elements of clarification should be added, namely, that the authorization by the State to the State enterprise or other entity to act as its agent and the guarantee by the State of the liability of the State enterprise or other entity should be very specific and should be reflected in a legally valid document, and that, beyond the strict limits of the authorization or scope of the guarantee, the liability should fall on the State enterprise or other entity and not on the State. Other delegations had supported the wording suggested in paragraph 80, provided that it would entirely replace current paragraph 3 of draft article 10. Some others had been in favour of deleting paragraph 3 and returning to the wording adopted on first reading. They had felt that paragraph 3 went beyond the normal scope of the other paragraphs of draft article 10. Furthermore, even with the clarification proposed by the Commission, some necessary exceptions had been omitted from paragraph 3, relating to possible undercapitalization of State enterprises and the possibility of piercing the corporate veil, since maintenance of secrecy was justified only in wartime, when the security of a State was at stake, but not in peacetime.

34. With regard to the fourth outstanding issue, relating to contracts of employment, a number of delegations had supported the amendment suggested in paragraph 104 of the report of the Commission's Working Group that the words "closely related to" should be deleted from paragraph 2 (a) of draft article 11 so as to limit the provision to "persons performing functions in the exercise of governmental authority"; that would bring clarity and precision to the provision. Other delegations had been in favour of retaining the existing wording, since it better reflected the standards set in their own national legislation. Moreover, it would maintain the necessary flexibility by shielding from the jurisdiction of the forum State activities which, although not in the exercise of governmental authority, were closely connected thereto. It would also more adequately protect the missions from undue intrusion into their internal functioning.

35. A number of delegations had supported the suggestion (paragraph 105 of the report of the Commission's Working Group) of adding a non-exhaustive list of the categories of employees to which the general rule in paragraph 1 of draft article 11 would not apply, to serve as guidance to national courts. Others had felt that such a list was unnecessary and that the issue should be left for national courts to decide. Some delegations had been of the view that if the list was to be retained, more emphasis should be placed on the fact that it was non-exhaustive and that other categories of personnel, for example, members of a peacekeeping or peacemaking force, might also be included. Other delegations had thought it preferable to

include the list in the commentary to the draft articles rather than in the text of the provision.

36. There had been widespread support for the suggestion (paragraph 106 of the report of the Commission's Working Group) that paragraph 2 (c) of draft article 11 should be deleted because it could not be reconciled with the principle of non-discrimination based on nationality. A number of delegations had expressed the view that paragraph 2 (d) of draft article 11 might also present problems with regard to the principle of non-discrimination based on nationality, particularly in relation to employees residing permanently in the forum State. There had been general agreement, however, that subparagraph (d) should be retained but that language should be added to meet the concerns of delegations regarding employees residing permanently in the forum State.

37. With regard to the fifth outstanding issue, relating to measures of constraint against State property, several delegations had supported the distinction (paragraph 126 of the report of the Commission's Working Group) between pre-judgement and post-judgement measures of constraint. The distinction, which could be useful in overcoming the difficulties inherent in the issue, was based on the notion that State immunity should be broader with respect to "pre-judgement measures of constraint" than to measures taken to execute a judgement. Some delegations had expressed doubts that the distinction would be significant in practice. Others had been opposed to the inclusion of the concept of "pre-judgement measures of constraint" because they viewed it as a possible source of abuses and of unwarranted attachments against the property of the State.

38. With regard to post-judgement measures, several delegations had expressed a preference for alternative I (in paragraph 129 of the report of the Commission's Working Group) as the most effective way of executing the judgement and at the same time balancing the interests of the defendant State to have a reasonable time to comply with the judgement and the interests of the claimant State to attain prompt compliance with the judgement in its favour. Furthermore, it was flexible enough to grant the defendant State the freedom to determine property for execution. In that regard it had been suggested that the language of subparagraph (i) should be clarified so as to enhance the idea that during the grace period the State could either comply with the judgement or indicate property earmarked for execution of the judgement.

39. Other delegations had thought that alternative II was more flexible than alternative I, taking into account that the paragraph dealt with measures of execution against a State. In their view, alternative II constituted a more realistic approach that would enable States upholding the concept of absolute immunity to proceed to a gradual shift in their position. Other delegations had had reservations about alternative II, because, in their view, the initiation of dispute settlement procedures between States was out of place in a process which should ensure prompt execution of a judgement. The dispute settlement procedure might reopen substantive issues involved in the claim and unduly delay compliance with a judgement favourable to a State. In practice, it might mean that only States with the resources to engage in lengthy and costly dispute settlement procedures would benefit. During the debate it had been clarified that subparagraph (ii) of alternative II limited the dispute settlement procedure to execution of the judgement and excluded the merits of the case.

40. Some delegations had found alternative III the most appropriate. Since the issues involved in the execution of a judgement against a State were delicate and complex, in particular the matters of public policy that might have influenced the conduct of a State against which a judgement was handed down, it would be better to leave the matter of execution of the judgement to State practice. Other delegations had found that alternative unacceptable and had felt that provisions on the execution of judgements must be an integral part of the draft articles. Otherwise, the recognition of exceptions to State immunity in the draft articles, and the judgements resulting therefrom would constitute a futile exercise. Some delegations had expressed a preference for the original wording of draft article 18.

41. The Working Group had decided that the question of the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law, although an interesting issue, did not relate to the draft articles and was not ripe for codification. In any case, it would be up to the Sixth Committee and not to its Working Group to decide whether any action should be taken. The view had been expressed that the issue should be considered by the

Third Committee and not by the Sixth Committee, particularly with regard to non-impunity issues.

42. In terms of the future course of action to be taken with regard to the topic, the Working Group had generally agreed that the International Law Commission had amply fulfilled its mandate to prepare the draft articles and that the responsibility now lay with the General Assembly to bring to fruition the Commission's work. There was therefore no need for the topic to be referred back to the Commission unless a very specific mandate were elaborated. Further efforts on the topic should continue in the Sixth Committee and, more specifically, in the framework of its Working Group with the aim of resolving the outstanding issues and others that might arise in relation to the draft articles. The view had been expressed that, in order to facilitate resolution of the outstanding issues, it was advisable to take a decision on the form to be given to the outcome of the work on the topic. It had also been said, however, that the decision would depend primarily on the results of the debate on the substantive issues and consequently could only be taken at a later stage. In the view of some delegations, the Working Group should not be reconvened until the fifty-sixth session of the General Assembly, in order to allow Governments more time to reflect on the issues involved. Many delegations, however, had been of the view that, in order to maintain the momentum, the Working Group should resume its work at the fifty-fifth session of the General Assembly and that it should be given more time to carry out its work, five full working days according to some delegations.

43. As Chairman of the Working Group, he would suggest on the basis of the debates that it might be worthwhile, with regard to the concept of a State for purposes of immunity, to follow the Commission's suggestion to merge "political subdivisions of the State" and "constituent units of a federal State" into one paragraph. With regard to the bracketed text suggested by the Commission, it might be useful to restrict immunity to cases where, at the time of the dispute, it had been clearly established that the act had been performed in the exercise of governmental authority. It would also be necessary to ensure consistency in the wording used in subparagraphs (ii) and (iii) of paragraph 1 (b) of draft article 2.

44. At the moment, it appeared extremely difficult to reach agreement regarding the criteria for determining the commercial character of a contract or transaction. To foster agreement, it would be necessary to delete reference to specific criteria, as had been suggested by the Commission in 1999.

45. With regard to the concept of a State enterprise or other entity in relation to commercial transactions, in order to clarify the issue addressed in paragraph 3 of draft article 10, it might be useful to separate the issue of the legal capacity of the State enterprise from questions which might arise, *inter alia*, in connection with undercapitalization or misrepresentation of the entity's financial position. There was a further set of issues that concerned the relationship between the State and the relevant State enterprise. All those issues and others that might arise should be dealt with separately in order to facilitate agreement on the topic.

46. With regard to contracts of employment, consideration might be given to dropping the words "closely related to" in paragraph 2 (a) of draft article 11. In the list of different conventions, a broadening of the categories appeared to be necessary. Moreover, in order to reflect the views of the delegations that wished to retain the words "closely related to", it might be useful to reconsider those categories. In any case, the non-exhaustive character of the list should be emphasized. The tendency of the debate had been in favour of deleting paragraph 2 (c) of draft article 11. On the other hand, it had not been considered desirable to apply the exemption contained in paragraph 2 (d) of draft article 11 to nationals of the employer State having their permanent residence in the forum State.

47. In view of the divergent practice of national courts and legislation on measures of constraint against State property, the Commission had submitted several alternatives, including a distinction between pre-judgement and post-judgement measures of constraint. All the alternatives had met with both support and opposition, and no clear trend had emerged. Nonetheless, the exchange of views in the Working Group had been useful, because it had revealed the wide spectrum of positions that would need to be taken into account in the further deliberations on the matter.

48. With regard to the appendix to the report of the Commission's Working Group, in the light of the debate, it did not seem advisable to include the matter among the issues for further consideration. With respect to the future course of action to be taken, the discussions in the Working Group had shown that

progress was feasible on the preparation of an instrument on the topic of jurisdictional immunities of States and their property.

Agenda item 159: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization *(continued)* (A/C.6/54/L.3/Rev.1)

49. **Mr. Hanson-Hall** (Ghana), introducing draft resolution A/C.6/54/L.3/Rev.1 entitled "Implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions", said that the resolution represented a consensus and he hoped the Committee would adopt it without a vote.

50. *Draft resolution A/C.6/54/L.3/Rev.1 was adopted.*

51. **Mr. Panevkin** (Russian Federation) said that, at the next session of the General Assembly, the Sixth Committee should consider the possibility of establishing a working group on assistance to third States affected by the application of sanctions.

52. **The Chairman** announced that the Committee had concluded its consideration of agenda item 159.

The meeting rose at 11.55 a.m.